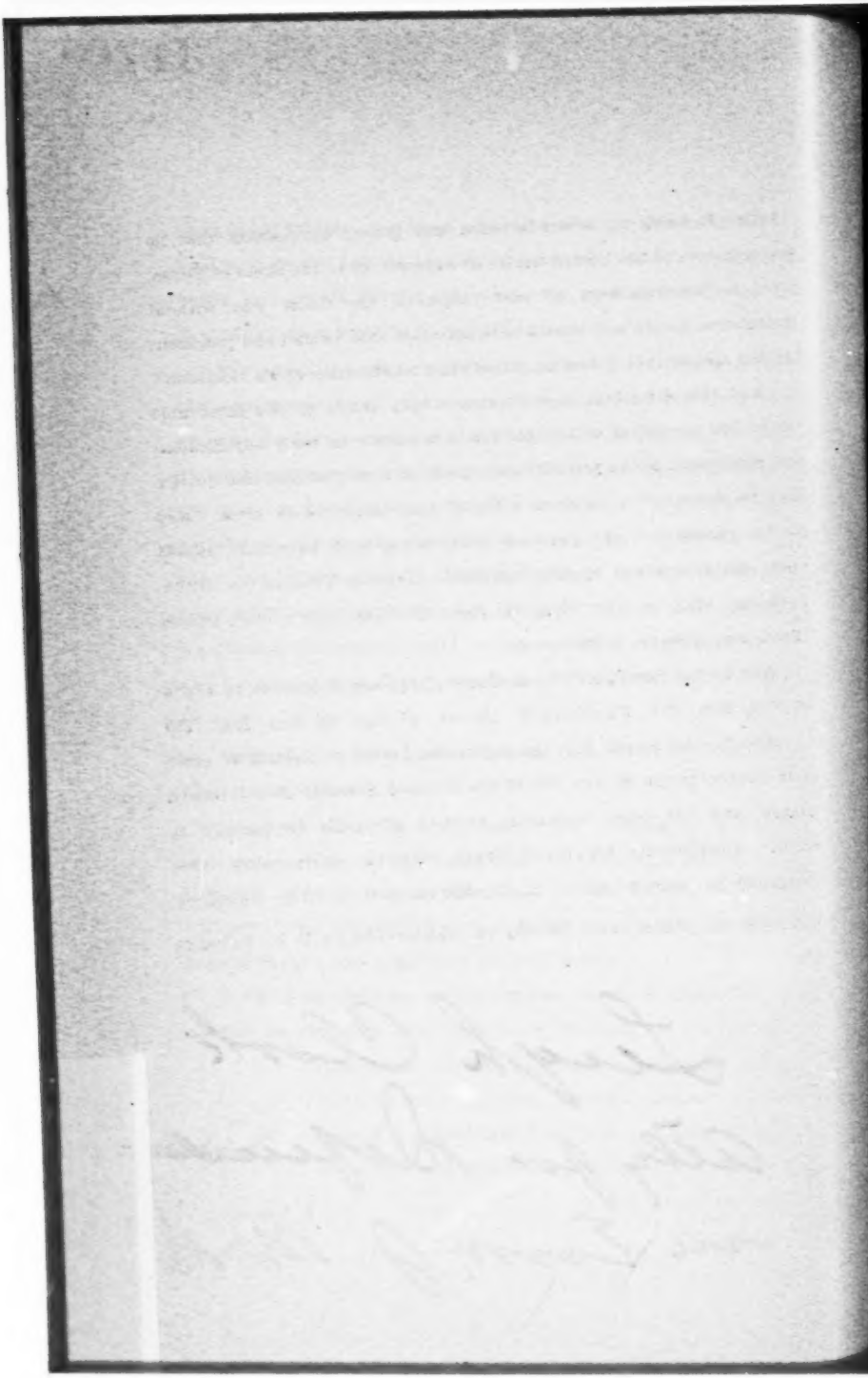

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Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 336.

MEXICAN CENTRAL RAILWAY COMPANY, LIMITED, PLAINTIFF IN ERROR,

v.

J. M. DUTHIE, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

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STATEMENT.

This case is brought before this court on writ of error to the circuit court of the United States for the western district of Texas, issued under the provisions of the fifth section of the judiciary act of March 3, 1891, to determine the jurisdiction of said court therein. The record upon which the questions of jurisdiction arise is fully certified by the court below (Rec., 42–55).

The suit is brought by the plaintiff, Duthie, in his own right, for the recovery of damages for personal injuries sustained by him on the 22d day of July, 1901, while a passenger on one of the defendant company's trains at a station called Ojo Caliente on the line of the company's railway in the Republic of Mexico, and in behalf of the community

estate of himself and wife, for damages for personal injuries sustained by his wife, Frances A. Duthie, also a passenger on said train at said time and place. Plaintiff's original petition was filed August 29, 1901 (Rec., 1–13, 50), and citation against the defendant issued thereon (Rec., 13, 14). Defendant excepted to the citation on the ground that the date of filing plaintiff's petition was erroneously stated therein (Rec., 15), and by order of court said exception was sustained and service of citation quashed (Rec., 17). Defendant thereafter waived service and entered its appearance (Rec., 18). Afterwards and on March 19, 1902, plaintiff, by leave of court, filed his first amended original petition (Rec., 19–26, 43–50). Neither the original petition (Rec., 50), the original first amended petition (Rec., 43–50), nor any other part of the record contained any allegation of plaintiff's citizenship.

To such amended petition defendant filed a general demurrer and exception, and also answered, traversing all the allegations thereof (Rec., 18, 51). Defendant's general demurrer and exception was overruled, the defendant excepting thereto (Rec., 57), and, each party having announced themselves ready for trial, on April 9, 1902, the cause came on for trial before a jury (Rec., 51). No evidence was adduced by either party as to plaintiff's or defendant's residence, domicile, habitation, or citizenship (Rec., 38). On the following day, the jury having found a verdict assessing plaintiff's damages at $8,500, of which sum $7,500 was for injuries sustained by himself and $1,000 for injuries sustained by his wife (Rec., 26, 51), said verdict was by the court approved and judgment entered against the defendant in the sum of $8,500 (Rec., 27, 52). After entry of judgment no further proceedings were had in the cause until the 17th day of April following, when plaintiff filed a motion asking leave to amend his original and first amended original petition by inserting therein, after the allegations thereof as to plaintiff's residence, the words "and is a citizen of said

"State and of the United States of America," so as to read: "That plaintiff resides in El Paso, in El Paso county, "State of Texas, in the western district of said State, "*and is a citizen of said State and of the United States of America*" (Rec., 28, 52, 53); to the granting of which motion defendant objected on the ground that the court was without power to permit an amendment of the pleadings and alteration of the record without setting aside and holding for naught the verdict and judgment entered therein, but should dismiss said cause for want of jurisdiction (Rec., 40). On the day the motion was filed the court made an order granting leave to plaintiff to amend his petitions as prayed (Rec., 29, 53, 54); to which order defendant then and there in open court excepted, and on the following day filed its final bill of exceptions (Rec., 30–41).

The questions certified by the court below are as follows:

"*First.* Whether or not the court should have dismissed this cause for want of jurisdiction upon becoming aware that the record did not contain the necessary jurisdictional matters.

"*Second.* Whether the judgment rendered in this cause is validated and made effective by reason of the amendment made by plaintiff as aforesaid.

"*Third.* Whether the court had jurisdiction, after verdict and after judgment entered upon said verdict, to permit, without setting aside this judgment and verdict, the plaintiff to amend his petitions, both original and amended, by inserting the necessary jurisdictional averments therein.

"See *Maddox v. Thorn*, 60 F. R., 217.

"*Tremain v. Hitchcock*, 90 U. S., 97.

"*Fourth.* Whether or not the court should have set aside the verdict and judgment rendered herein and dismissed this case for want of jurisdiction on its own motion."

ASSIGNMENT OF ERRORS.

1st. The court erred in overruling defendant's demurrer to plaintiff's petition for the reason that the averments thereof were not sufficient to show that the court had jurisdiction therein.

2d. That the court had no jurisdiction in this cause and should have dismissed the same upon its own motion.

3d. That the court should not have permitted plaintiff to destroy or alter the record by interlining in the pleadings certain jurisdictional averments, and the trial court had no jurisdiction to permit plaintiff to amend his original petition and first amended original petition by inserting the necessary jurisdictional averments therein without first setting aside the verdict and judgment herein and granting a new trial.

4th. It being nowhere averred and proved by plaintiff that he was a citizen of the United States of America or of the State of Texas prior to the rendition of said judgment, the court was without jurisdiction herein and should have set aside said verdict and judgment for the reason that it had no jurisdiction at the time of its rendition.

Rec., 55.

ARGUMENT.

I.

The court erred in overruling defendant's demurrer to plaintiff's petition for the reason that the averments thereof were not sufficient to show that the court had jurisdiction therein.

Upon his original pleadings, on which this cause was tried, and which contained no averments of the essential jurisdictional fact of citizenship, it is, of course, manifest that plaintiff could not recover.

Robertson v. Cease, 97 U. S., 646, 649.
Timmons v. Elyton Land Co., 139 U. S., 378.

And even had the question of jurisdiction not been raised in the court below, or suggested on appeal, this court would *sua sponte* reverse the judgment of the circuit court, no averment of the citizenship of plaintiff appearing in the record.

Horne v. George H. Hammond Co., 155 U. S., 393.
Chapman v. Barney, 129 U. S., 677, 681.
Everhart v. Huntsville College, 120 U. S., 223, 224.
King Bridge Co. v. Otoe County, 120 U. S., 225, 226.

In no part of the record on which this case was tried, nor until the allowance of the amendment by the court, was there any averment whatever as to the citizenship of the plaintiff which could sustain the jurisdiction of the court under the rule laid down by this court in the case of *Muller v. Dows*, 94 U. S., 444.

The question of jurisdiction was properly raised by de-

fendant's demurrer by plea rather than in abatement to the jurisdiction.

North American Transportation, &c., Co. v. Morrison, 178 U. S., 262, 267.
Southern Pacific Co. v. Denton, 146 U. S., 203, 205.
Sullivan v. Fulton Steamboat Co., 6 Wheat., 450.
Laskey v. Newtown Mining Co.. 50 Fed. Rep., 634.
United States National Bank v. McNair, 56 Fed. Rep., 323, 324.
Fry v. Rousseau, 3 McLean, 106.
Rogers v. Linn, 2 McLean, 126.
Donaldson v. Hazen, 1 Hempst., 423.

In *Coal Company v. Blatchford*, 11 Wall., 172, this court said (p. 178):

> "A plea in abatement is required only where the "citizenship averred is such as to support the juris- "diction of the court and the defendant desires to "controvert the averment."

The defect in the petition being one of substance and not of form, a general demurrer was the proper way of raising the question. Indeed, it was the only proper mode. Plea to the jurisdiction implies an issue of fact. None such could be raised on plaintiff's petition, which disclosed in most patent manner that the cause was not within the jurisdiction of the circuit court, for as the petition then stood it is manifest no judgment could have been lawfully entered thereon.

It is manifest, therefore, that the court below erred in overruling defendant's demurrer and allowing the cause to proceed to trial upon the defective pleadings.

II.

After the verdict and judgment entered thereon, the trial court should not have allowed plaintiff to amend his pleadings by inserting the necessary jurisdictional averments therein without first setting aside the verdict and judgment and granting a new trial.

It is submitted that the action of the trial court in permitting the amendment of the pleadings in matter of substance, after verdict and judgment, and without setting verdict and judgment aside and awarding a *venire de novo*, thus in effect basing the judgment upon an issue not covered by the verdict and never presented to the jury, is in violation of fundamental principles of law and contrary to Federal practice. The defect was not such an one as would be validated by verdict, in which case no amendment would have been necessary, and the issue of plaintiff's citizenship never having been tried, no amendment of pleadings can read it into the verdict and judgment. True it is that this court has held that the statute of jeofails and amendments (Rev. Stats. U. S., sec. 954) extends to amendments after verdict, but such amendments are only authorized to cure some technical defect of verdict or judgment, as in the case of *Roach v. Hulings*, 16 Pet., 319, and *Shaw v. Railroad Co.*, 101 U. S., 657, and not to include under the verdict an issue never tried. No evidence as to plaintiff's citizenship was introduced at the trial (Rec., 38), nor could it have been under the pleadings. The pleadings upon which the case was tried and verdict found contain no allegations whatever as to the plaintiff's citizenship, and the amendment of those pleadings *after verdict* so as to show such citizenship cannot by relation back make the verdict cover a point not in issue. The verdict found upon pleadings which are substantially defective is itself defective, and judgment entered thereon is void. The well-known case of

Garland v. Davis, 4 How., 131, is here directly in point. That was an action on the case sounding in tort. The defendant pleaded *non assumpsit* instead of the proper plea of not guilty," the only contract alleged in the declaration being merely by way of inducement. Issue being joined, the case was tried and verdict found for plaintiff. The court held the plea of *non assumpsit* to be fatally defective, nor such an one as could be cured by verdict, Mr. Justice Woodbury delivering the opinion of the court, saying (p. 147):

> "The defect here, then, is in the verdict as well as "plea, and though a mere informality in the former "is cured by the act of Congress as to amendments (16 "Pet., 319), yet the defect here is similar in both, and "as just shown, being on principle in both a defect "in substance no less than form, is uncured (*Stearns 'v. Barrett*, 1 Mason, 170, and 2 Mason, 31).
>
> "But several arguments have been offered against "a reversal of the judgment and further proceedings, "and in favor of rendering judgment for the plaintiff, "on this record, though the plea, issue, and verdict "are all defective in substance, and do not show "which party is entitled to recover, on the real merits "in dispute, or that they have been legally tried.
>
> "These arguments it is our duty to examine. One "is that the whole merits, according to the evidence re- "ported, may have actually been considered and "passed upon in the court below under this plea and "issue. But it is a sufficient answer to this, that if so "done it was illegally done, no evidence being com- "petent under that issue except the promise described "in it, and no opinion of the jury or the court being "regular or proper under it except as to that promise "alone (*Harrison et al. v. Nixon*, 9 Pet., 483)
>
> "There are many cases showing that the evidence "must be limited to the plea (*Mar. Ins. Company v.*

"*Hodgson*, 6 Cranch, 206; 4 Wheat, 64, in case of "*The Divina Pastora*). The court say you must 'not "'admit the introduction of evidence varying from "'the facts alleged' (9 Pet., 484). The *probata* should "conform to the *allegata* (*Boone v. Chiles*, 10 Pet., 177).

"In *Barnes v. Williams*, 11 Wheat., 416, it is said: "'Upon inspecting the record, it has been discovered "'that the special verdict found in the case was too "'imperfect to enable the court to render judgment "'upon it.' A certain fact was important to the re- "covery. 'Although in the opinion of the court "'there was sufficient evidence in the special verdict "'from which the jury might have found the fact, "'yet they have not found it, and the court could not "'upon a special verdict intend it.'

"These illustrations and cases tend to show the "difficulties in forming an opinion on anything not "found or apparent on the record; and the impropriety "of conjecturing and pronouncing on the real merits, "when both the issue and verdict are defective in "substance in relation to them."

And the court reversed the judgment of the court below and remanded the cause for further proceedings.

So also in *Barnes v. Williams*, 11 Wheat., 415, where the special verdict was defective in matter of substance, this court, per Marshall, C. J., held that the trial court could not intend any substantive fact not found by the jury, although the record contained sufficient evidence to warrant the jury in finding it, and reversed the judgment, remanding the cause with direction to the trial court to award a *venire facias de novo*.

In the case of *Smith v. Jackson*, 1 Paine, 486 (*s. c.*, 22 Fed. Cases 13,065, p. 576) the points involved were identical with those here in issue. The district court, *after judgment entered*, allowed plaintiff to amend his declaration (1) to show that

plaintiff was a citizen of the State of New York, and (2) that the value of the property in controversy was over five hundred dollars. The case coming before the circuit court, inquiry was directed as to whether the trial court had power to allow such amendment (1) at common law, and (2) by statute. The opinion of the court by Mr. Justice Thompson, sitting on the circuit, gives such a learned discussion of the law of amendments that we quote it *in extenso*. He says (p. 488):

> "The exercise of the authority of courts to amend
> "at common law has in the history of the judicial
> "proceedings of the English courts undergone very
> "considerable changes, and courts grew much more lib-
> "eral on that subject, even before any provision was
> "made by statute. Anciently the amendment could
> "be made only in the term in which the judicial act
> "was done and recorded; as during this term the pro-
> "ceeding was deemed to be in the judges' breasts, and
> "not in the roll. Afterwards a more liberal practice
> "was introduced, and amendments were allowed at
> "any time pending the suit or proceedings, and whilst
> "they were considered *in fieri*, and until final judg-
> "ment was rendered and enrolled. But in no instance
> "will it be found, I believe, that the court made any
> "amendment whatever after the expiration of the
> "term in which final judgment was given. And as
> "to what amendments the courts would make at
> "common law, there seems to be much confusion and
> "uncertainty. As it was a matter in some measure
> "of discretion, liberal judges would allow amend-
> "ments that more scrupulous ones would not. The
> "amendments, however, made at common law were,
> "generally speaking, of trivial errors, and then only
> "where there was something to amend by. It is un-
> "necessary, however, to pursue this inquiry, for the
> "amendments made in this case were a year after

"final judgment, and so, clearly not within any com-
"mon-law powers of the court.

"2. The limited powers of the courts at common
"law, gave rise in England to the various statutes of
"amendments and jeofails. Those in England are, I
"believe, twelve or thirteen in number, passed at
"various periods, from the time of Edward the 3d to
"George 1st. These statutes thus passed by piece-
"meals, and in reference to the successive parts and
"steps, in the pleadings and proceedings in the cause,
"gave rise to almost innumerable cases on this sub-
"ject, which has occasioned no little confusion, if
"not some contradiction. With these, however,
"we have no concern, any further than they are
"decisions upon statutes analogous to our own.
"So far as any statutory provision goes, we must be
"governed by the act of Congress on this subject.
"The 32d section of the judiciary act (1 Stat., 91) de-
"clares, that no summons, writ, declaration, return,
"process, judgment, or other proceedings, in civil
"causes in any of the courts of the United States,
"shall be abated, arrested, quashed, or reversed for
"any defect or want of form; but judgment shall be
"given without regarding matters of form, except
"such as shall be specially demurred to. And au-
"thority is given to the courts to amend such imper-
"fections and wants of form, except such as shall
"be specially excepted to by demurrer; and they
"may at any time permit either of the parties
"to amend any defect in the process or pleadings,
"upon such conditions as the said courts respect-
"ively shall, in their discretion and by their
"rules, prescribe. That every part of this section,
"except the last clause, relates to such defects as are
"deemed matters of form cannot admit of a doubt.
"And this power over such defects of form, extends as

"well to the appellate court, as to the court where the "proceedings have been had; not that the amend- "ment is always actually made in the appellate court. "But the defect is not to be regarded as matter of "error. And the act declares that judgment shall be "given without regard to such imperfections or want "of form, and no conditions are to be imposed on "parties by reason of such formal defects. The last "clause in the act, however, may be extended further, "and embrace matters of substance; it authorizes the "court at any time, to amend any defect in the pro- "cess and pleadings, upon such conditions as the "court shall direct. *This power is confined to the pro- "cess and pleadings, and reaches all defects; it does not "extend to the judgment. When, therefore, an amend- "ment is made in substance, it must be whilst the pro- "ceedings are in fieri, and before judgment; and the "court then does it upon such terms as shall be deemed "just and equitable; and this is giving much greater "power over amendments than existed at common "law.* The court below might in this case, be- "fore final judgment, have permitted the amend- "ments upon terms as to costs, pleading anew, or "issuing a *venire de novo*, &c. Under the English "statutes of amendments and jeofails, neither the "aid of a verdict, nor an amendment can extend to "matters of substance, or whatever is essential to the "gist of the action, but only to defects in matters of "form. *All matters of substance must be stated in "the pleadings; and if stated, may occasion a different "verdict from that given when not stated. Hence, "whatever is thus essential, cannot be cured by ver- "dict, nor introduced by way of amendment; but by "the express intent of some* statute allowing the "amendment, or aiding the defect. It is a general "and essential rule of law, that all substantial facts

"be stated in proper time and place, so that the other "party may know what in substance he has to answer "to, and prepare accordingly. Every material matter "must be so clearly and directly stated, that the op- "posite party may put it in issue if he pleases. Much "nicety may be found in the books as to what is to be "deemed form and what substance. But as it respects "the present case, no doubt can exist but that the "amendments were in matters of substance. That it "was essential to aver, that the defendant was a citizen "of a State different from that of the plaintiff, has "been repeatedly decided by the Supreme Court of "the United States; and many judgments have been "reversed for this defect. *This was a fact that might "have been denied, and an issue joined thereon, and must "be tried by a jury. If there be no such averment, there "need be no such proof; and the verdict of the jury can "therefore afford no inference that there was any such "proof on the trial.*"

This court has uniformly held that, where the jurisdiction of the Federal court depends upon the citizenship of the parties, the presumption, in the absence of an affirmative showing of such citizenship by the record, is that the case is without the jurisdiction of the Federal court; that a mere averment of the residence of a party is insufficient to sustain the jurisdiction of the court; and that, the record being silent as to the citizenship of the parties, this court will reverse the judgment of the court below with directions to that court to grant a new trial upon proper amendment of the pleadings.

The case of *Robertson v. Cease*, 97 U. S., 464, in which this court on writ of error reversed the judgment of the circuit court of the United States for the western district of Texas, is, we submit, directly in point, and should have been held controlling by that court in the case at bar. That case was

an action upon a promissory note brought by Cease against Robertson, the plaintiff in error, in this court. There was no allegation as to the citizenship of Cease, the only averment as to him being that he "resides in the county of Mason and State of Illinois." Mr. Justice Harlan, delivering the opinion of the court, said (p. 648):

> "It is the settled doctrine of this court that, in cases "where the jurisdiction of the Federal courts depends "upon the citizenship of the parties, the facts essential "to support that jurisdiction, must appear somewhere "in the record. * * * Looking, then, at the plead- "ings, and to such portions of the transcript as prop- "erly constitute the record, we find nothing beyond "the naked averment of Cease's residence in Illinois, "which, according to the uniform course of decisions "in this court, is insufficient to show his citizenship "in that State. Citizenship and residence, as often "declared by this court, are not synonymous terms "(*Parker et al. v. Overman*, 18 How., 137).
>
> "In the oral argument before this court, the in- "quiry arose, whether since the adoption of the four- "teenth amendment to the Federal Constitution, the "mere allegation of residence in Illinois did not make "such a *prima facie* case of citizenship in that State as, "in the absence of proof, should be deemed sufficient "to sustain the jurisdiction of the circuit court. That "amendment declares that 'all persons born or natu- "'ralized in the United States, and subject to the juris- "'diction thereof, are citizens of the United States, "'and of the State where they reside.' It was sug- "gested that a resident of one of the States is *prima* "*facie* either a citizen of the United States or an "alien,—if a citizen of the United States, and also a "resident of one of the States, he is, by the terms of "the fourteenth amendment, also a citizen of the State

"wherein he resides,—and if an alien, he was en-
"titled in that capacity to sue in the Federal court,
"without regard to residence in any particular State.
"It is not to be denied that there is some force in
"these suggestions, but they do not convince us
"that it is either necessary or wise to modify the
"rules heretofore established by a long line of de-
"cisions upon the subject of the jurisdiction of
"the Federal courts. Those who think that the four-
"teenth amendment requires some modification of
"those rules, claim, not that the plaintiff's residence
"in a particular State necessarily or conclusively
"proves him to be a citizen of that State, within the
"meaning of the Constitution, but only that a gen-
"eral allegation of residence, without indicating the
"character of such residence, whether temporary or
"permanent, made a *prima facie* case of right to sue
"in the Federal courts. As the jurisdiction of the
"circuit court is limited in the sense that it has none
"except that conferred by the Constitution and
"laws of the United States, the presumption now,
"as well as before the adoption of the fourteenth
"amendment, is, that a cause is without its jurisdic-
"tion unless the contrary affirmatively appears. In
"cases where jurisdiction depends upon the citizen-
"ship of the parties, such citizenship, or the facts
"which in legal intendment constitute it, should be
"distinctly and positively averred in the pleadings,
"or they should appear affirmatively, and with equal
"distinctness, in other parts of the record. And so
"where jurisdiction depends upon the alienage of one
"of the parties. In *Brown v. Keene* (8 Pet., 115), Mr.
"Chief Justice Marshall said: 'The decisions of this
"'court require that the averment of jurisdiction
"'shall be positive, that the declaration shall state
"'expressly the fact on which jurisdiction depends.

"'It is not sufficient that jurisdiction may be in-
"'ferred argumentatively from its averments.'
"Here the only fact averred, or appearing from
"the record, is that Cease was a resident of Illinois;
"and we are, in effect, asked, in support of the juris-
"diction of the court below, to infer argumentatively,
"from the mere allegation of 'residence,' that, if not
"an alien, he had a fixed permanent domicile in that
"State, and was a native or naturalized citizen of the
"United States, and subject to the jurisdiction thereof.
"By such argumentative inferences, it is contended
"that we should ascertain the fact, vital to the juris-
"diction of the court, of his citizenship in some State
"other than that in which the suit was brought. We
"perceive nothing in either the language or policy of
"the fourteenth amendment which requires or justi-
"fies us in holding that the bare averment of the
"residence of the parties is sufficient, *prima facie*, to
"show jurisdiction. The judgment must, therefore,
"be reversed, upon the ground that it does not affirma-
"tively appear from the record that the defendant in
"error was entitled to sue in the circuit court.

* * * * * * *

"The judgment of the circuit court must, therefore
"be reversed, with directions to grant a new trial."

Halsted v. Buster, 119 U. S., 341, was an action to try title to real estate. The jury found a verdict for plaintiff and judgment was entered thereon. Defendant sued out a writ of error and the case came before this court. No averment of defendant's citizenship appeared on the record. Mr. Chief Justice Waite, speaking for the court, said (p. 342):

"For this reason the judgment is reversed, *but, as*
"*the fault rests alone on the plaintiff, whose duty it was*
"*in bringing the suit to make the jurisdiction appear, the*
"*reversal will be at his cost in this court.* (*Hancock v.*
"*Holbrook*, 112 U. S., 229.")

Chapman v. Barney, 129 U. S., 677, was an action of *assumpsit*. After trial had and verdict rendered in plaintiff's favor, the case came before this court on writ of error sued out by defendant. It appearing from the record that there was no satisfactory showing as to the citizenship of plaintiff, the court said (p. 682):

> "For these reasons we are of opinion that the rec-
> "ord does not show a case of which the circuit court
> "could take jurisdiction. The judgment of that court
> "must, therefore, be reversed at the costs, in this
> "court, of the defendant in error (*Hancock v. Hol-*
> "*brook*, 112 U. S., 229; *Halsted v. Buster, supra; Men-*
> "*ard v. Goggan, supra*). The judgment is reversed and
> "the cause remanded, with directions to set aside the
> "judgment, and for such further proceedings as may
> "not be inconsistent with this opinion."

The case of *Denny v. Pironi*, 141 U. S., 121, was an action brought in the circuit court for the northern district of Texas for the recovery of certain goods purchased of plaintiff. The only averment of the petition with respect to the citizenship of the parties was as follows:

> "That petitioners, who are hereafter styled plain-
> "tiffs, are and were at the times of the accrual
> "of the causes of action hereinafter stated, a mercan-
> "tile firm, composed as aforesaid, engaged in the
> "wholesale wine and liquor business in the city
> "and county of Los Angeles, California, where both
> "of said plaintiffs also reside; that defendant is a
> "resident citizen of Dallas county, Texas, within the
> "northern judicial district of Texas."

The case went to trial upon this allegation and the jury found a verdict in plaintiff's favor. Defendant moved in arrest of judgment, on the ground that there being no alle-

gation in the petition showing that plaintiff and defendant were citizens of different States, there was nothing to show the court had jurisdiction of the case. Thereupon plaintiffs filed a *remittitur* as to a portion of the judgment, in which the citizenship of the parties was fully stated. On the filing of this document the court made an order denying the motion in arrest of judgment and directed that execution issue for the balance of the judgment. The case coming before this court on writ of error sued out by defendant, this court, by Mr. Justice Brown, said (p. 123):

> "That an averment of residence is not the equiva-
> "lent of an averment of citizenship, and is insufficient
> "to give the circuit court jurisdiction, has been settled
> "in a multitude of cases in this court: *Parker v. Over-*
> "*man*, 18 How., 137; *Robertson v. Cease*, 97 U. S., 646;
> "*Everhart v. Huntsville College*, 120 U. S., 223; *Menard*
> "*v. Goggan*, 121 U. S., 253; and in case of a defective
> "averment in this particular the judgment will be
> "reversed by this court upon its own motion, and the
> "case remanded (*Peper v. Fordyce*, 119 U. S., 469;
> "*Everhart v. Huntsville College*, 120 U. S., 223; *Menard*
> "*v. Goggan*, 121 U. S., 253). A case cannot be amended
> "here so as to show jurisdiction, but the court below,
> "in its discretion, may allow it to be done where the
> "suit was instituted in the circuit court (*Continental*
> "*Insurance Company v. Rhoads*, 119 U. S., 237; *Halsted*
> "*v. Buster*, 119 U. S., 341).
>
> "This judgment then depends for its validity
> "wholly upon the question whether the mere recital
> "of the citizenship of the parties in the remittitur is
> "such an incorporation of the same into the record as
> "obviates the objection to the original petition and
> "supports the judgment.
>
> * * * * * * *
>
> "In the case under consideration, the remittitur
> "formed no proper part of the judgment record, and

" the recital of citizenship formed no proper part of the " remittitur. Undoubtedly proceedings subsequent to " the judgment are admissible to show what action has " been taken upon such judgment, as for instance, that " it has been vacated, stayed, amended, modified or " paid, that execution has been issued upon it, or that " a part of it has been remitted, but such proceedings " cannot be introduced to validate a judgment void " for the want of jurisdiction. Not only is the remit- " titur in this case open to this objection, but it ap- " pears upon its face not to have been filed in good " faith, but for the sole purpose of introducing the " averment of citizenship; in other words this aver- " ment is the object, and the remittitur the incident. " Remittiturs are used where the judgment has been " accidentally entered for a larger amount than was " due, or occasionally to forestall an appeal (*Pacific* " *Express Company v. Malin*, 132 U. S., 531), but never " to give jurisdiction where it is not otherwise shown. " *As well might it be contended that the difficulty could* " *be surmounted by filing an affidavit subsequent to judg-* " *ment. In either case it would be impossible for the* " *defendant to take issue upon it, or to submit it to the* " *court or jury as upon a plea in abatement.*

" *The judgment of the court below must be reversed, and* " *the case remanded for further proceedings not incon-* " *sistent with this opinion.*"

In *Cooper v. Newell*, 155 U. S., 532, an action to try title to real estate, the allegations of the petition with respect to the citizenship of the parties were as follows:

" The petition of Stewart Newell, a resident citizen " of the city of New York, in the State of New York, " hereinafter styled plaintiff, complaining of Eliza " Cooper, B. F. Cooper, and Fannie Westrope, *all resi-* " *dents of Galveston county, in the State of Texas*, and " hereinafter styled defendants."

There were no further allegations in the record respecting the citizenship of the parties. The jury found a verdict for plaintiff and judgment was entered thereon. Defendant sued out writ of error, assigning as one of the grounds for reversal the lack of jurisdiction of the circuit court, in that the citizenship of the defendants is not disclosed by the record.

Counsel for defendants in error argued that the averment of the petition as to the residence of defendants was *prima facie* evidence of citizenship. The chief justice, announcing the decision of the court, said (p. 534):

> "The judgment is reversed and the case remanded "to the circuit court for further proceedings, upon "the authority of *Horne v. George H. Hammond Com-"pany, ante*, 393, and cases cited."

See also:

Brown v. Keene, 8 Pet., 112.
Continental Insurance Co. v. Rhoads, 119 U. S., 237.
Menard v. Goggan, 121 U. S., 253.
Wolfe v. Hartford Life Ins. Co., 148 U. S., 386.
Horne v. George H. Hammond Co., 155 U. S., 393.
Bargh v. Page, 4 McLean, 10.

It will thus be seen that in all cases where the necessary jurisdictional averments have been lacking this court has reversed the judgment below, and has only allowed the amendment of the record below to embody such jurisdictional averments, *upon the setting aside of verdict and judgment, and the granting of a new trial.* As said by this court in *Denny v. Pironi, supra*, speaking of the effect of filing a *remittitur* therein: "As well might it be contended that the "difficulty could be overcome by filing an affidavit subse-"quent to judgment. *In either case it would be impossible "for the defendant to take issue upon it, or to submit it to the "court or jury as upon a plea in abatement.*"

The case of *The Tremolo Patent*, 23 Wall., 518, cited by the circuit court in its certificate, after the third jurisdictional question, under the style of *Tremaine v. Hitchcock*, 90 U. S., 97, is, we submit, not in point. In that case the court below allowed the amendment of the bill after final decree by inserting therein an averment of the second reissue of a patent, and Mr. Justice Strong, delivering the opinion of the court, said (p. 527):

> "We think that the order of the court directing that "the record be amended by inserting in the bill an "averment of the second reissue was properly made, "under the circumstances of the case, though made "after the final decree. *For practically the rights of the "complainants under the second reissue, and the defend-"ants' infringement thereof were in issue under the an-"swer and the replication.*"

It will thus be seen that the case cited bears no relation to the case at bar.

The averment inserted in the bill was of a matter which had been in issue in the cause, and, as admitted by counsel for the defendants and cross-appellants in his argument before this court (p. 526), "the bill was amended so as to let "in the proofs." In the case at bar, however, the citizenship of plaintiff was not in issue, nor was any evidence before the jury in that regard. Moreover, neither *The Tremolo Patent* case nor the case of *Maddox v. Thorn*, 60 Fed. Rep., 217, also cited by the court below, were jury cases, the former being an equity cause and the latter a case submitted to the court without a jury. In *Maddox v. Thorn* the court had announced its findings, but had not yet entered judgment. The case being tried before the court without a jury, defendants had the opportunity of contesting the issue raised by the amendment of the petition, had they so desired, all opportunity of doing which is denied to plaintiff in error here unless this court shall remand the case for a new trial.

Nevertheless it is submitted that the case of *Maddox v. Thorn* is contrary to the settled decisions of this court.

But independently of the established decisions of the Federal courts and the general principles of law on this question of amendments, there is a further and controlling reason why the court below should be reversed for error in allowing the amendment of plaintiff's petition after verdict. Such amendments are prohibited by the Texas statutes and are not allowed in the Texas courts, except after an arrest of judgment or new trial granted, when the judgment is set aside and the case proceeded with as if no trial had been had. By the practice conformity act of June 1, 1872, U. S. Rev. Stats., sec. 914, the specific provisions of the State statutes in this respect are controlling. As said by Mr. Justice Gray in *Glenn v. Sumner*, 132 U. S., 152, 156:

> "The sufficiency and scope of pleadings, *and the "form and effect of verdicts*, in actions at law, are mat- "ters in which the circuit courts of the United States "are governed by the practice of the courts of the "State in which they are held."

In *Henderson v. Louisville, &c., Railroad*, 123 U. S., 61, the question before the court being the amendment of the petition, this court, per Mr. Justice Gray, holding that the amendment could not be allowed, said (p. 64):

> "This action being upon the common-law side of "the circuit court, the pleadings and practice were "governed by the law of the State (Rev. Stats., "§ 914)."

He then cites and applies the provisions of the Louisiana Code of Practice.

In *Phillips, etc., Construction Co. v. Seymour*, 91 U. S., 646, the plaintiff, who had declared in covenant, was allowed to introduce evidence to prove that defendant had made a ver-

bal promise to pay the extra cost of certain construction work not included in the sealed agreement, and a special verdict covering such additional amount was found by the jury in plaintiff's favor. This court reversed the judgment with directions to set aside the special verdict, Mr. Justice Miller, *per curiam*, saying (p. 655):

> "The State of Illinois has adhered to the system of "pleading which recognizes the lines that separate the "forms of action at common law, and the act of Con- "gress requires the circuit court to conform to the "mode of pleading of the State in which the court sits. "Undoubtedly there was error under that system in "admitting proof of a parol contract of this kind in "an action of covenant; * * * In those States "where the distinctions between forms of action "have been abolished the declaration could have "been amended, and the two matters joined in the "same action. In that case we might, under the "statute of jeofails, disregard the error as one capa- "ble of removal by amendment below, and as cured "by verdict and judgment when it comes here.
>
> "But sec. 954 of the Revised Statutes, which was "section 32 of the judiciary act of 1789, was founded "on the English statute of 32 Henry VIII, and is no "broader. This act of Congress has been frequently "construed by this court in such a manner as to for- "bid its application to the case before us (*Garland v.* "*Davis*, 4 How., 131; *Stockton et al. v. Bishop, id.*, 155; "*Jackson v. Ashton*, 10 Pet., 480).
>
> "There is no room here for amendment. There "could have been none in the court below. To allow "a verdict to stand which is responsive to no issue "made by the pleadings, or which could have been "made by any pleadings in that action, is farther "than we can go in the promotion of abstract justice."

And so in *Atlantic & Pacific Railroad Co. v. Laird*, 164 U. S., 393, this court, in affirming the action of the trial court in allowing an amendment to the complaint during the trial, based its decision solely upon the California statutes and the decisions of the California courts.

In *Mack v. Porter*, 72 Fed. Rep., 236, the circuit court of appeals for the fourth circuit, in affirming the action of the court below in allowing certain amendments pending trial, said (p. 243):

> "In matters of this nature, the courts of the United "States are governed by the laws of the State where "the litigation is had."

See also—

People's, &c., Bank v. Batchelder Egg Case Co., 2 C. C. A., 126; 51 Fed. Rep., 130.

Post v. Wise Township, 101 Fed. Rep., 204.

Wolf v. Cook, 40 Fed. Rep., 432.

Amendments to pleadings under the Texas statute and practice are not allowable after verdict and judgment, except that after arrest of judgment or new trial granted the court may allow such amendment as if no trial had been had, or judgment reached. The act of March 9, 1889, amending the act of May 13, 1846 (Rev. Stats. Texas, art. 1188), provides that:

> "All amendments to pleadings, pleas and pleas of "intervention, must, when court is in session, be filed "under leave of the court, upon such terms as the "court may prescribe, before the parties announce "ready for trial, *and not thereafter*."

And section 34 of the act of May 13, 1846 (Rev. Stats. Texas, art. 1189), reads:

> "Such leave shall be given, and such amendment "filed, for a reasonable time before the case is called "for trial, so as not to operate a surprise to the oppo-"site party."

Section 114 of the act of May 13, 1846 (Rev. Stats. Texas, art. 1190), provides:

> "Whenever a judgment has been arrested or a new "trial granted, because of the insufficiency of the "pleadings of the party in whose favor the judgment "was rendered, the court may allow such pleadings "to be amended as if no such trial had been had or "judgment rendered."

In *Petty v. Lang*, 81 Tex., 238, plaintiffs during trial sought to amend their pleadings so as to allege a release of a levy of attachment in order to meet the allegations of defendant's plea in reconvention. The trial court allowed the amendment and plaintiffs were permitted to prove the release. The case coming up on defendant's appeal, the supreme court of Texas said (p. 241):

> "In view of the statute on the subject (Rev. Stats. "art. 1192) reading 'The pleadings may be amended "'under leave of the court upon such terms as the "'court may prescribe, before the parties announce "'ready for trial,' the permission to amend was an "error."

Heflin v. Burns, 70 Tex., 347, was an action of trespass to try title. Defendant plead the statute of limitations. At the trial plaintiff sought by amending her pleadings to set up the coverture of her grantor, in order to avoid the defendant's plea of limitations. This the trial court refused to allow. The case coming up on plaintiff's appeal, the supreme court said (p. 352):

> "This refusal was authorized and perhaps required "by the statutory rule (Rev. Stats., art. 1192). 'The "'pleadings may be amended under leave of the court "'upon such terms as the court may prescribe, before "'the parties announce themselves ready for trial, and "'*not thereafter*.'"

In *Missouri Pacific Railway Co. v. Howe*, 47 Tex. App. C., § 197, the facts are thus stated in the opinion:

> "Appellee recovered judgment against appellant for "$603.50 damages for destruction of his crops by fire "escaping from appellant's engines. On the trial, "when the evidence had been concluded and it had "been developed that a portion of the crops destroyed "belonged at the time of their destruction to the ten- "ants of appellee, the court, over the objection of ap- "pellant, permitted appellee to file a pleading alleg- "ing that, before the institution of the suit, he had "purchased from said tenants their claim for damages "to their said crops, etc. Under this pleading, and "the evidence, appellee recovered for the damages to "the crops of said tenants."

In reversing the court below for this error the court of civil appeals said:

> "To allow such a pleading was a violation of the "statute and of the rules of court governing plead- "ings and to tolerate such a violation would practi- "cally abolish our system of pleading. It would "permit a party to conform his allegations to his "proof after his evidence has been adduced, *when the "true rule is that his evidence must conform to his alle- "gations, and, unless it does, he cannot recover.*"

We know of no other case in which a trial court, after verdict found and the discharge of the jury, has, without the consent of the opposing party, allowed an amendment of pleadings, raising a new issue on a material point, on which no evidence whatsoever had been submitted to the jury, without first setting aside the verdict and granting a new trial. As shown above, the uniform practice of this court, in cases where the necessary jurisdictional averments were lacking

in the record, has been to reverse the judgment of the trial court and remand the case for a new trial upon the proper amendments setting forth the essential jurisdictional averments being made.

Where, after verdict, an amendment is made adding a substantial issue to the pleadings, there must of necessity be a new trial, for the new issue having never been passed upon by the jury, it can only be determined in that way.

The jury in this case brought in their verdict April 10 (Rec., 51), and on the same day judgment was entered thereon (Rec., 52). Not until the 17th of April, nearly a week thereafter, did plaintiff file his motion to amend (Rec., 52). The motion was taken up forthwith and granted unconditionally upon the *ex parte* showing of plaintiff's verified motion (Rec., 53). There is nothing in the record to show that defendant was given any opportunity of combatting this showing by filing counter-affidavits, and the precipitancy with which the proceedings were rushed through would seem to preclude any such possibility. Even had such opportunity been given, it would not have met the exigencies of the case. We are aware of no principle or theory of law under which issues of fact in an action at law can be divided up and determined piecemeal, part by the jury and part by the court; or by which a court, by allowing the alteration or substitution of pleadings, can make the jury's verdict cover issues never presented to them. The citizenship of the plaintiff is a substantive fact in the case. It is not such a fact as by fair intendment can be held to have been passed upon by the jury in arriving at their verdict, and the omission of which from the pleadings would be cured by the verdict. No evidence was adduced by either party as to plaintiff's residence, domicile, habitation, or citizenship (Rec., 51). By what authority, then, can the circuit court, by allowing an amendment to the petition without setting aside the verdict and judgment, make it appear that the verdict of the jury covers matters never in issue before them?

We submit, therefore, that the circuit court erred—

First. In overruling defendant's demurrer to plaintiff's petition, it not appearing from said petition or from the record in the case that the court had jurisdiction of the cause; and

Second. In allowing plaintiff to amend his petition by inserting therein the allegation of his citizenship without first setting aside the verdict and judgment and granting a new trial.

For which errors it is further respectfully submitted the judgment of the circuit court should be reversed at cost of defendant in error and the cause remanded to that court with directions to grant a new trial.

Respectfully submitted.

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